ORIGINAL

No. 90-6105

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN H. EVANS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a public official may be convicted of extortion under color of official right in violation of the Hobbs Act only if the jury is instructed that it must find that the public official initiated the transaction that resulted in his receipt of an unlawful payoff.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 910 F.2d 790.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The petition for a writ of certiorari was filed on October 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner, an elected County

Commissioner, was convicted of attempted extortion "under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951; and of filing a false income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 18 months' imprisonment for the Hobbs Act violation and to four years' probation on the tax fraud count. The court of appeals affirmed.

1. In 1985, Clifford Cormany, Jr., an FBI agent, was working undercover in the Atlanta area investigating allegations of public corruption. He posed as a representative of a group of real estate investors interested in developing land in DeKalb County. In March 1985, Agent Cormany was introduced to petitioner, an elected member of the DeKalb County Board of Commissioners, by Albert Johnson, an individual also under investigation. Petitioner was told that Cormany's investment group was looking for assistance with matters relating to rezoning and variances. Pet. App. 3.

Between August 1985 and October 1986 petitioner and Agent Cormany had a series of meetings and telephone conversations, most of which were video-taped or audio-taped. At the first of these meetings, in August 1985, Cormany told petitioner that he wanted to give his investment group a "leg up" on other developers in DeKalb County by cultivating a close association with the public bodies that dealt with zoning and related matters. Petitioner agreed to arrange for Cormany and Johnson to meet with other County Commissioners. Pet. App. 3.

In May 1986, Cormany and Johnson contacted petitioner and told him that they wanted to have a plot zoned for the highest density

possible and were willing to do whatever was needed to achieve that result. During the course of that conversation, there was a discussion of petitioner's reelection campaign. In response to a query from Johnson about what size contribution would be considered "meaningful," petitioner replied that at a recent fundraising event contributors were encouraged to give $1,000 apiece. Johnson also asked whether petitioner needed any "expense money." Petitioner stated that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that the registration list would cost him about $260. Cormany then wrote out a check to petitioner for $300. Petitioner used that money to buy the list and sent a thank you note to Cormany. Pet. App. 3-4.

In July 1986, Cormany and Johnson met petitioner again and informed him that they had a particular tract of land in mind for rezoning to a higher density. They told petitioner that expense monies would be available for him if needed. Petitioner recommended that Cormany and Johnson meet with members of the County Planning Department so they could get their rezoning application filed as soon as possible. On the morning of July 23, 1986, petitioner called Cormany. The two men discussed the rezoning application and petitioner's campaign, and they arranged to meet the next day. Pet. App. 4.

Petitioner and Cormany met as scheduled on July 24. Petitioner showed Cormany a document containing his campaign budget from June 29 through the primary election on August 12. The document showed a budget of $14,180 and campaign contributions of

$6,295, resulting in a shortfall of $7,885. After Cormany said, "I desperately need[] your help and support on this project," petitioner said: "Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that." Pet. App. 4. When Cormany responded, "You're talking about seven eight eighty-five," petitioner responded affirmatively, and stated, "I understand both of us are groping * * * for what we want to say to each other." Ibid. Petitioner added: "If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do." Id. at 5.

Cormany then asked whether his contribution should be in cash or by check. Petitioner first responded that the payment should be in cash, "so there won't be any, any, tinges, or anything." Pet. App. 4. He then modified that by asking for a check for $1,000, adding "that means we gonna record it and report it and then the rest would be in cash." Ibid. Cormany then said, "I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way," and petitioner responded, "I understand that." Ibid.

Later that day, but before Cormany had paid petitioner, Cormany tried to file the application for rezoning the property, but the application was rejected because the property had been

rezoned less than two years earlier. Petitioner and Cormany met again on July 25 and discussed whether the two-year limitation could be waived. At that meeting, Cormany gave petitioner $7,000 in cash, which petitioner placed in an envelope, and a check for $1,000 payable to "John Evans Campaign." Petitioner locked the cash in a file cabinet in his campaign office. Petitioner did not at that time record the $7,000 in cash on his books or on the required state campaign financing disclosure form. At the August 12 DeKalb County Commission meeting, the waiver was granted by a 4-0 vote. Pet. App. 5.

Cormany subsequently informed petitioner that approval of the zoning application would require an amendment to the comprehensive land use plan. After the Planning Department recommended denial of the application to make such an amendment to the comprehensive plan, Cormany withdrew the zoning application. Pet. App. 5.

About 14 months after Cormany had given petitioner the $8,000, two FBI agents interviewed petitioner at his office. Petitioner was informed that the agents wished to ask him about campaign contributions he had received from developers. Petitioner told the agents that Cormany had given him $1,000 and that all of the contributions he received from individuals were reflected in his campaign disclosure reports. Petitioner did not mention the $7,000 cash payment he received from Cormany. Pet. App. 5-6.

At the end of petitioner's campaign, he had a surplus of more than $7,000, counting the $7,000 he received in cash from Cormany. Petitioner argued that he used $4,100 of the $7,000 to repay in

cash a portion of an old campaign debt to his mother, and used the remaining $2,900 to repay himself for loans he made to his campaigns from 1982 through 1986. He did not record these payments in his books or amend his state disclosure forms, however, until after he knew he was under investigation. He did not report the $7,000 payment as personal income on his 1986 income tax return. Pet. App. 5-6.

2. On June 16, 1988, petitioner was indicted on one count of violating the Hobbs Act by wrongfully obtaining under color of official right both the $1,000 campaign contribution check and the $7,000 cash payment. He also was indicted on one count of filing a false 1986 income tax return by not reporting the $7,000 cash payment as personal income.

With respect to the tax fraud count, the district court instructed the jury: "[I]f you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return." Pet. App. 36. With respect to the Hobbs Act count, the district court instructed the jury that it was not a violation of the Hobbs Act to take a campaign contribution unless the contribution was induced as a quid pro quo for an official act:

> The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Pet. App. 7, 32-33. The district court further instructed the jury that to convict petitioner on either the Hobbs Act count or the tax fraud count it must find that petitioner acted "voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law." Pet. App. 36.

The jury convicted petitioner on both the tax fraud count and the Hobbs Act count.

3. The court of appeals affirmed. Pet. App. 1-15. With respect to the Hobbs Act conviction, the court rejected petitioner's argument that the jury should have been instructed that it had to find that petitioner initiated the transaction that induced Cormany to part with the money. The court instead held that for the offense of extortion under color of official right, the "inducement" requirement of the Hobbs Act is satisfied if "the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power." Pet. App. 7.

ARGUMENT

1. Petitioner asserts (Pet. 16-23) that there is a conflict among the circuits respecting whether a public official must initiate a corrupt payoff to satisfy the "inducement" element of a Hobbs Act violation. While a theoretical conflict does exist

among the circuits on the meaning of inducement under the Hobbs Act, in this case and in virtually all other cases the outcome would be the same under any of the differing formulations of inducement. Accordingly, review by this Court is not warranted. Petitioner also suggests that this case should be held for the decision in United States v. McCormick, No. 89-1918. However, that is not appropriate because McCormick does not present the issue raised in this case.

a. The Hobbs Act defines "extortion" to include "the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. 1951(b)(2). A number of courts of appeals have stated that a public official who received a payoff may be found guilty under the Act as long as the official knew that the wrongful payment he received was motivated by a desire for a specific exercise of his official power. See, e.g., United States v. Garner, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); United States v. Spitler, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); United States v. McClelland, 731 F.2d 1438, 1439-1440 (9th Cir. 1984), cert. denied, 472 U.S. 1010 (1985); United States v. Jannotti, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); United States v. French, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Williams, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); United States v. Butler, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); United States v. Hall, 536 F.2d 313, 320-321 (10th

Cir.), cert. denied, 429 U.S. 919 (1976); United States v. Hathaway, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).

Recently, the Ninth and Second Circuits have held that evidence of the mere passive receipt of an unlawful payoff by a public official is not sufficient to support a Hobbs Act conviction. United States v. Aguon, 851 F.2d 1158, 1166-1167 (9th Cir. 1988) (en banc); United States v. O'Grady, 742 F.2d 682, 687-689 (2d Cir. 1984) (en banc). Those two cases create a theoretical conflict with the other circuits, but the conflict has little practical significance. As the Seventh Circuit recognized, "[t]here is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been presented was the official passive." United States v. Holzer, 816 F.2d 304, 311 (7th Cir.), vacated, 488 U.S. 928 (1987), aff'd in part on remand, 840 F.2d 1343 (1988). Indeed, the Second Circuit reviewed each of the appellate decisions suggesting that passive acceptance of a gratuity violates the Hobbs Act, and concluded that "the facts of those cases * * * establish conduct from which inducement can readily be inferred." 742 F.2d at 689.

Moreover, the Second Circuit and the Ninth Circuit both recognized that a public official may induce a payoff in a variety of ways. The Second Circuit stated that "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a quid pro quo would

suffice as would other circumstantial evidence tending to show that the public official induced the benefits." 742 F.2d at 691-692. In the case before it, the court added, if the defendant "created the impression, not by words but by deeds, that vendors whose business fortunes with the [New York City Transit Authority] depended on him were expected to make generous 'gifts' to him, then [the defendant] could not escape conviction." Id. at 692. The Ninth Circuit similarly held that "'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct in office." 851 F.2d at 1166.

Subsequent decisions of the Second and Ninth Circuits make clear that Aguon and O'Grady provide only that a Hobbs Act conviction may not be "based on mere acceptance of a contribution." United States v. Egan, 860 F.2d 904, 907 (9th Cir. 1988). In Egan, the "district court did not use the word 'inducement' in its jury instructions," ibid., but the Ninth Circuit affirmed a Hobbs Act conviction because the instructions provided that the defendant could be convicted only if the jury found that he had communicated that favors were for sale. In United States v. Campo, 774 F.2d 566, 569 (1985), quoting 742 F.2d at 694 (Pierce, J., concurring), the Second Circuit noted that a majority of the court had concluded in O'Grady "that 'the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits.'" The court in Campo affirmed the Hobbs Act conviction of a police officer who

repeatedly accepted $50 from the operator of a disco for patrolling the area around the disco, although the police officer had not initiated the payoffs. 774 F.2d at 568.

The first question presented in the petition states that the issue is whether a Hobbs Act conviction may be based "upon mere passive acceptance" of a payoff. Pet. i. But the facts did not show mere passive acceptance. To the contrary, the give and take between petitioner and Cormany evident during their recorded conversation on July 24, 1986, would constitute "inducement" of a payoff by petitioner in any court of appeals, including the Second and Ninth Circuits. It was petitioner who said, "you don't know how I operate" and proceeded to suggest the proper amount of the payoff by referring to his campaign budget. Pet. App. 4. It was also petitioner who reassured Cormany that "I understand both of us are groping * * * for what we need to say to each other." Ibid. And petitioner took the initiative in directing that the $8,000 payment should be divided between a $1,000 campaign contribution that would be reported as such and a $7,000 cash payment that would not be reported "so there won't be any, any, tinges, or anything." Id. at 5.

The jury instructions also required the jury to find inducement on petitioner's part. The jury was instructed that it had to find that the payments were made as part of a quid pro quo arrangement, Pet. App. 33, and that is sufficient to constitute proof of inducement in the Second and the Ninth Circuits. Aguon, 742 F.2d at 691-692; Campo, 774 F.2d at 569; Egan, 860 U.S. at 907.

Since the jury found that petitioner offered his services for sale and entered into an arrangement in which he effectively sold those services for money, his conviction would be affirmed by any court of appeals. This case therefore does not warrant further review by this Court.

b. There is no need to hold this case for McCormick v. United States, because the petitioner in McCormick has not raised the question presented here. The focus of the petitioner's argument in McCormick is that the jury was instructed that it need not find that "the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of money not lawfully owed." 89-1918 J.A. 22, 32-33. No such issue is presented in this case, where the jury was told that a public official violates the Hobbs Act if he "demands or accepts money in exchange for [a] specific requested exercise of his or her official power." Pet. App. 33. The petitioner in McCormick also broadly argues that extortion "under color of official right" merely prohibits public officials from pretending that a fee is due or that a fee in excess of the lawful fee is due. If the Court were to agree with that argument that the Hobbs Act proscribes fraud rather than extortion, prosecutions such as this would not be permissible. However, petitioner has not advanced the argument that extortion under color of official right is committed only where a public official pretends that a fee is due, so there is no reason to hold this case for McCormick.

2. The second question presented is whether an elected public official may be convicted of filing a false tax return for not reporting money that was used to pay old campaign debts. As petitioner concedes, Pet. i n.1, that issue was not raised before the Eleventh Circuit and was not addressed in the court of appeals' opinion. The petition does not include any argument on this second question, but footnote 1 in the petition suggests that the question is fairly subsumed by the primary question presented concerning the nature of the proof of inducement required under the Hobbs Act.

Contrary to petitioner's suggestion, the tax fraud question he seeks to raise is entirely separate and distinct from the Hobbs Act question presented in this case. The jury was instructed that it could not convict petitioner of tax fraud if it found "that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts." Pet. App. 36. It is apparent that the jury disbelieved petitioner's claim that his payments to his mother and to himself were reimbursements of expenses or debts out of campaign funds, but instead found that petitioner held the $7,000 in cash as personal income. Petitioner's failure to record those asserted "repayments" until after he discovered he was under investigation may well have influenced the jury in its assessment of the credibility of this defense. In light of the finding by the jury that petitioner accepted a cash payoff rather than a campaign contribution and failed to report it on his tax return, his tax fraud conviction should stand. That is so even if his Hobbs Act conviction were

reversed on account of defective jury instructions with respect to inducement, since the tax fraud offense does not require proof that petitioner induced the payment he failed to report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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